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In the

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. [redacted] 62

ROBERT J. JOBE and WILLIAM B. FARNEY,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

MOTION TO DISMISS

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Copy of this MOTION TO DISMISS was served upon James C. Ware, Attorney for Appellants, 507 First National Bank Building, Covington, Kentucky, this 27th day of May, 1965.

Harry L. Riggs Jr.

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MOTION TO DISMISS

Appellee in the above-titled case moves to dismiss this appeal on the grounds that the question presented is so unsubstantial as to not need further argument.

JURISDICTION

The jurisdiction of this Court which is sought to be invoked by the appellants is based upon 28 U.S.C. Section No. 1257 (2). The appellants herein are opponent to the annexation granted this appellee by the Second Division of the Kenton Circuit Court, Commonwealth of Kentucky. The appellants in their JURISDICTIONAL STATEMENT go to great length to deleniate the jurisdiction of this Court. If such jurisdiction exists, it is predicated upon whether the denial of the right of appeal of cities of the third and fifth class, where such right of appeals is granted cities of the first, second, fourth and sixth class, violates the Fourteenth Amendment of the United States

Constitution which expressly forbids a state to deny to any person within this jurisdiction equal protection of the laws. The answer to this question was long ago laid to rest by this Court in 1885. The equal protection clause does not require an appeal in a particular type of proceeding if all persons within a class are treated alike although an appeal may be allowed to persons differently situated. In the case of *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky,* 115 U.S. 321, 29 L. ed 414, 6 S. Ct. 57, this Court was called upon to decide the constitutionality of a special tax by the Commonwealth of Kentucky upon railroads. After first passing upon other matters and at the end of the opinion, the Court stated:

> "We have already decided that the mode of valuing railroad property for taxation under this statute is due process of law. That being so, the provision securing the equal protection of the laws, does not require, in any case, an appeal, although it may be allowed in respect to other persons, differently situated. This was expressly decided by this Court in the case of *Missouri* v. *Louis,* 101 U.S. 22, 30. It was there said by Mr. Justice Bradley, delivering the opinion of the Court and speaking to this point, that, 'The last restriction, as to equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject matter, amount, or finality of decision, if all persons within the territorial limits of the irrespective jurisdictions have an equal right, in like cases, and under like circumstances, to resort to them for redress'. The right to classify railroad property as a separate class for purposes of taxation grows out of the inherent nature of the property and the discretion vest by the constitution of the state in the legislature, and necessarily involve the right, on its part, to divest and carry into effect a distinct scheme, with different tribunals, in the proceedings to valuate."

Inasmuch as this particular point has been decided by this Court and not changed or modified by subsequent decision, the matter deserves no further consideration.

ARGUMENT

Appellants, in their JURISDICTIONAL STATEMENT places persons located within any of the first six classes of cities as classified by the legislature of the Commonwealth of Kentucky in one class. They attempt to infer that members within that one class are differently treated regarding right of appeals from annexation. Appellants here overlook the fact that the Court is dealing with six different classes of persons of which these appellants are only one particular class.

As long as the law operates alike on all members in the class, which includes all persons and property similarly situated, it is not subject to any objection that it is special or class legislation, and is not in violation of the federal guarantee of the equal protection of laws. See *Great Atlantic & P. Tea Co.* v. *Grosjean,* 201 U.S. 412, 81 L. ed. 1193, 57 S. Ct. 772, 112 A.L.R. 293; *Phelps* v. *Board of Education,* 300 U.S. 319, 81 L. ed. 674, 57 S. Ct. 483; *Henderson Co.* v. *Thompson,* 300 U.S. 258, 81 L. ed. 632, 57 S. Ct. 447; *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.,* 299 U.S. 183, 81 L. ed. 109, 57 S. Ct. 139, 106 A.L.R. 1476; *Young* v *Masci,* 289 U.S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170.

In addition, the validity of a statute is not effected by the fact that the legislation is based on a classification and is made to apply only to certain limited groups of persons and not to others, if it is so designed that all persons subject to its provisions are treated alike under similar conditions and circumstances. See *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 73 L. ed. 184, 49 S. Ct. 61, 62 A.L.R.

785; *Jones* v. *Brim,* 165 U.S. 180, 41 L. ed. 677, 17 S. Ct. 282, affg. 11 Utah 200, 39 P. 825; *McPherson* v. *Blacker,* 146 U.S. 1, 36 L. ed. 869, 13 S. Ct. 3; *Walston* v. *Nevin,* 128 U.S. 578.

No attempt is made to infer that residents of third class cities received different treatment in their right of appeal from annexation proceedings. No attempt is made to show that the classification of third class cities is so unreasonable as to be discriminatory.

CONCLUSION

Based upon the case of *Cincinnati NO & T P R I Co.* v. *Commonwealth of Kentucky, supra* and upon the foregoing arguments it is respectfully submitted that the appeal should be dismissed as the question presented is so unsubstantial as to not need further argument.

Respectfully submitted,

HARRY L. RIGGS, JR.
Counsel for Appellee

APPENDIX A

In The
COURT OF APPEALS OF KENTUCKY

No. V-66-62

ROBERT J. JOBE and WILLIAM B. EARNEY,
Appellants,

vs.

CITY OF ERLANGER,
Appellee.

BRIEF FOR APPELLEE

STATEMENT OF FACTS

MAY IT PLEASE THE COURT:

This is an Appeal from the decision of the Kenton Circuit Court approving the annexation to the City of Erlanger of certain unincorporated territory lying to the southeast of the present corporate limits. While the Appellees find no discrepancies or inaccuracies in the Appellants' brief statement of fact, we wish to call to the attention of this honorable court that certain stipulations were entered into between the parties, number two of which provides as follows:

(2) That Ordinance No. 1026 (ordinance proposing annexation) of the City of Erlanger, adopted May 5, 1959, was properly passed and published according to the applicable provisions of the Kentucky Revised Statutes and no objection is made thereto by the Plaintiff.

ARGUMENT

A. THE STATUTES UNDER WHICH THE CITY OF ERLANGER PROCEEDED TO ANNEX THE TERRITORY INVOLVED IS CONSTITUTIONAL, AND IT IS NOT A TAKING OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW OR PROHIBITED BY THE FEDERAL CONSTITUTION AND SECTIONS 13 AND 2 OF THE CONSTITUTION OF KENTUCKY.

Appellant's brief seeks to revive an issue which has long since been laid to rest by numerous decisions of this court. Appellants contend that KRS 81.190 is unconstitutional for the reasons that there is a denial of the right of appeal and inasmuch as the right of appeal is granted in annexation matters to certain classes of cities and denied to others, this section amounts to special legislation which is discriminatory in its classification.

The question of the constitutionality in denying the right of appeal was settled in the recent case of *Yount* v. *City of Frankfort,* 255 S.W. 2d 632.

In this case the constitutionality of KRS 81.190 was challenged as it applies to the attempted annexation by the City of Frankfort, then a city of the third class. In upholding the constitutionality of this section the court stated as follows:

> "Furthermore, they cannot complain of the ruling of the court denying them default judgment since KRS 81.190(4) provides there shall be no appeal from the judgment of the circuit court in annexation proceedings by a third class city. *The power of the Legislature to deny the right of appeal has always been recognized.* Section 110 Ky. Constitution; Mason v. Montgomery County Board of Education, 291 Ky. 654, 165 S.W. 2d 346. However, we have

written that where in the same case the constitutionality of an Act of the Legislature is raised, which is independent in its nature, strictly judicial and one of great consequence, it would be considered on appeal. Engle v. Miller, 303 Ky. 731, 199 S.W. 2d 123. While we cannot consider the merits of this case on appeal, we can determine whether or not the ordinance proposing annexation was duly passed, as well as the constitutionality of KRS 81.190." (Italics added.)

Appellant also attacks KRS 81.190 on the grounds that it is special legislation and that the proposed annexation amounts to a taking of private property in violation of the Federal Constitution and the Constitution of Kentucky. Again Appellees respectively direct the court's attention to the case of *Yount* v. *City of Frankfort*, (*supra*).

"Appellants' next contention that KRS 81.190 violates Kentucky Constitution Paragraph 2 (absolute and arbitrary power over life and property does not exist), Paragraph 59 (forbidding special legislation), and Paragraph 1 of the Fourteenth Amendment to the Federal Constitution (due process clause), is so conclusively answered in Lewis v. Brandenburg, 105 Ky. 14, 47 S.W. 862, 48 S.W. 978, on petition for rehearing, and Lenox Land Co. v. City of Oakdale, 137 Ky. 484, 125 S.W. 1089, 127 S.W. 538, on petition for rehearing, that we do not deem it necessary in this opinion to restate the law. It will suffice to lift this one except from Page 1091 of 125 S.W. in the Oakdale opinion:

'But it has been repeatedly announced, by this court and others, that the question of due process of law or taking of property without compensation has no application to the annexation of territory to a municipality. The extension or reduction of the boundaries of a city or town is held, without exception, to be purely a political matter, entirely within the power of the Legislature of the state to

> *regulate*. The established doctrine is that the state Legislature has the unlimited right to pass such laws for the annexation of territory to municipal corporations as in its judgment will best accomplish the desired end, and that a different method may be provided for each class.' " (Italics added.)

This court has long recognized the fact that the creation or incorporation of a municipality including the extension or reduction of its boundaries is a political act and legislative function. In these cases the trial court merely declares the action of the legislature to be operative. In the case of *Engle et al* v. *Miller,* 303 Ky. 731, 199 S.W. 2d 123 the court recognized the right of the legislature to deny an appeal. In this case the court was construing KRS 81.060 which provides for the establishment of cities. While that particular section and the one under attack in this case are different, both sections are purely political matters and entirely within the power of the legislature of the Commonwealth of Kentucky to regulate. In that case the court stated:

> "Therefore, the denial of the right of appeal contained in KRS 81.060 (which is the same as before the amendment of 1946) must be construed as having particular or special reference to the subject matter of the section of the statute of which it is a part, namely, that relating to proceedings and judgments establishing a city. *The action of the circuit court in that matter is not strictly judicial, for the creation or incorporation of a municipality is a political act and legislative function. The General Assembly has set up the conditions for the establishment of a city or town and conferred the power upon the court to determine whether certain facts exist.* That is the limit of judicial action. When the specified conditions are found to exist, there is no further judicial discretion in the court. The court, in effect, merely de-

clares the act of the Legislature to be operative. Jernigan v. City of Madisonville, 102 Ky. 313, 43 S.W. 448, 39 L.R.A. 214; Carrithers v. City of Shelbyville, 126 Ky. 769, 104 S.W. 744, 17 L.R.A. N.S., 421, 31 Ky. Law Rep. 1166; Boone County v. Town of Verona, 190 Ky. 430, 227 S.W. 804. It is to this that the provision with respect to denying an appeal relates." (Italics added.)

From the foregoing, Appellee respectfully submits that KRS 81.190 is neither unconstitutional in its denial of the right of appeal, nor is it unconstitutional for the reason that it violates the Federal Constitution and the Constitution of the Commonwealth of Kentucky.

B. THE JUDGMENT OF THE COURT SUSTAINING ANNEXATION IS AMPLY SUPPORTED BY THE EVIDENCE.

The Appellants go to great length in attempting to show that each of the findings of the court are contrary to the evidence. No attempt will be made here to go into unnecessary detail to substantiate the court's findings of fact. However, a few of the more prominent items will be noted.

Appellants attempt to point out that the City of Erlanger has additional area available to it for expansion and annexation. Certain statements of Mr. James Viox, City Engineer, are noted in the Appellants' brief. Appellants failed to read further where these statements are clarified.

On Re-direct Examination, Transcript of Evidence, (Page 19):

"Q. You pointed out to Mr. Nolan certain area on the northeast city limits which was susceptible to annexation. This area here?

A. That's right.

Q. Will you tell the court exactly what type of terrain, general development, and improvements are now in this area, if you know?

A. In my opinion, that is not desirable to be annexed on account of its terrain. It is very rough. It makes this place look like a prairie by comparison."

Appellants attempted to show that the water main on Turkeyfoot Road was not the result of negotiations between the City and the Kenton County Water Commission. The evidence on this point is clear and uncontradicted. Attention is directed to Pages 6, 7, and 8 of the Transcript of Evidence but more particularly to the following testimony by Mr. James Viox, City Engineer, on Page 7:

"Q. Will you tell us, if you know, who laid the water line which joins the water line on Turkeyfoot coming up Stephenson Road in the City of Erlanger.

A. The Kenton County Water District paid for this section from Turkeyfoot back to the City limits. The City of Erlanger paid for practically all the other. They paid for two inches extra because they wanted an eight inch line back rather than the six inch which is what the City needed.

Q. At whose request was the line from Turkeyfoot Road to Stephenson Road laid?

A. At the City's instigation. The City of Erlanger requested it. In fact, they were practically entirely instrumental in getting it there.

Q. Do you know whether or not the City of Erlanger bore any of the connection of that line which joins Turkeyfoot Road and comes up Stephenson to the City of Erlanger?

A. No part as far as the County. The major portion after it gets to the City on up to the end of the existing main on Stephenson, was borne by the City of Erlanger. No part in the County was borne by the City. It was paid by the District."

Appellants again attempt to infer that the testimony of the city witnesses do not support the findings of the court, that the sanitary sewer line which crosses the area involved is a result of a contract entered into by the City of Erlanger and the Sanitation District and that part of the expenses incurred in the construction of this line were borne in part by the residents of the City of Erlanger.

The evidence more than sustains this finding. The entire testimony of Mr. Viox, City Engineer, is clear on all points. The sanitary sewer improvements in this area were clearly explained by Mr. Viox. In Transcript of Evidence. Pages 8 and 9:

"Q. Are you also familiar with the sanitary sewer improvements that have been made in the area proposed to be annexed that were borne by the City of Erlanger?

A. Yes. The City of Erlanger just a few months ago had an operational disposal plant almost at the end of the City Limits, within the City near to the end. After we joined the Sanitation District, they came out and put in a pumping station situated down here and built a trunk line that intercepted our plant, which runs through this section back in the creek area.

Q. It runs through to the section proposed to be annexed?

A. Yes, through the middle.

Q. Is it a gravity or pressure line?

A. Gravity.

Q. Am I correct in assuming it ties into the plant you just described?

A. The plant originally had was abandoned about one month or so ago and now runs through this—the plant has been cut out and runs down the trunk line the District built to connect its plant to the pump station and in turn is pumped back to the plant at Bromley.